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In The

Supreme Court of the United States

ARTHUR J. MISISCHIA, D.M.D.,

Petitioner,

v.

ST. JOHN'S MERCY HEALTH SYSTEMS, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In this case, the Eighth Circuit affirmed the District Court's dismissal of Petitioner's civil RICO Complaint. The Eighth Circuit concluded that Petitioner's RICO claims could have been included in a state court action that was filed in 1994. Petitioner's 2004 RICO Complaint includes allegations that Respondents committed predicate acts of racketeering as recently as 2001 and 2002. The questions presented are as follows:

1. Whether the Separate Accrual Rule adopted by a majority of the circuit courts is the proper standard for determining when a civil RICO claim accrues and how the four-year statute of limitations is applied.

2. Whether a civil RICO Complaint which alleges predicate acts of racketeering occurring within four years prior to the filing of the lawsuit and causing injury to Petitioner states a claim for which relief may be granted, regardless of the fact that some earlier predicate acts committed more than four years prior to filing the RICO action could have been raised in a prior lawsuit.

3. Whether this Court's ruling in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) permits the dismissal of a civil RICO case where the Complaint alleges predicate acts that amount to or threaten the likelihood of continued criminal activity and new injuries occurring within the limitations period even if some earlier predicate acts could have been raised in a prior lawsuit.

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REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Petitioner, Arthur J. Misischia, D.M.D., respectfully submits this Reply Brief in response to the Brief in Opposition filed by St. John's Mercy Health System ("Respondent") and in further support of the Petition for Writ of Certiorari.

The issue in the instant case is when a RICO cause of action accrues and whether the multiple predicate acts and injuries charged in the Complaint are actionable – even if some of those racketeering activities occurred more than four years prior to the filing of this legal action or even if some of the predicate acts alleged could have been raised in an earlier lawsuit. This case does not involve a mere attempt to relitigate a state court case that was filed in 1994 as Respondent contends. In fact, Respondent's Brief in Opposition shines a spotlight on the widespread confusion over when a RICO claim may be prosecuted. This Court's guidance is needed to answer the threshold question as to when a civil cause of action accrues under RICO and what are the implications of each individual predicate act.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve This Important RICO Issue By Endorsing the Separate Accrual Rule.

A majority of circuit courts have adopted the Separate Accrual Rule.[1] This Court has previously acknowledged

[1] "The rule is that a cause of action accrues when new overt acts occur within the limitations period, even if a conspiracy was formed and

(Continued on following page)

the Separate Accrual Rule, but it has deferred making a declaration as to whether that Rule will apply in disputes where numerous predicate acts and multiple injuries occur over an extended period of time.

From the opening line of the Brief in Opposition, Respondent implies that this case is only about the decision of a St. Louis hospital to suspend a doctor's medical staff privileges.[2] Despite attempts to paint Petitioner as a lone disgruntled individual, this case demonstrates the continued confusion over when a RICO claim accrues and when victims of racketeering across the nation may prosecute claims under RICO for new predicate acts. In addition, Petitioner, as a medical professional, is in a unique position to blow the whistle on dangerous health care practices and billing fraud. As noted in the Brief of *Amicus Curiae* Association of American Physicians and Surgeons (AAPS), retaliatory acts against physicians who strive for quality patient care are routine. Consequently, the ability of physicians to bring abuses to light should not be curtailed, and the RICO statute should be given the teeth intended by Congress to protect all victims from continuing acts of racketeering. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-98 (1985).

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other acts were committed outside the limitations period." *State Farm v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring).

[2] St. John's inflammatory charge that Petitioner "punched a patient" is not supported by the record. Petitioner's brief suspension was based on a finding that "in a stressful situation without adequate assistance, [plaintiff] reacted with excessive physical force in attempting to restrain a patient who was combative while under anesthesia." *Misischia v. St. John's Mercy Medical Center*, 30 S.W.3d 848, 855-56 (Mo. Ct. App. 2000) ("*Misischia I*").

Justice Alito explained that "anybody – from a Mafia captain to a captain of industry – can be a 'racketeer' if he or she engages in *organized* criminal activity." Samuel Alito, Jr., *Racketeering Made Simple(r)*, in THE RICO RACKET at 3 (Gary McDowell ed., 1989). He pointed out that Congress has consistently expanded the reach of RICO in its 1984 and 1986 revisions, and that in *Sedima* this Court specifically rejected judge-made limitations to civil RICO. *Id.* at 3, 10-11.

As explained by the *Amicus Curiae*, this case has far reaching implications, including the quality of medical care available to the public in this country. To permit confusion, as to the application of RICO in this context, adversely impacts the ability of the societal actor who is aware of wrong-doings in a hospital and who has the motive and resources to stand upon principle and challenge those illicit practices. The medical doctor who is willing to step up and confront wrong-doings in a hospital, at great risk to his career, needs clarity and certainty in the legal instruments he is to employ.

Petitioner submits that this Court should adopt the Separate Accrual Rule, clarifying that a person may bring a RICO claim for ongoing predicate acts that cause him injury within the four-year limitations period. Adoption of this Rule would make great strides towards ending the prevalent confusion over what predicate acts may be prosecuted in a civil RICO action. *See Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103 (2d Cir. 1988) ("There may be encompassed within a single RICO violation injuries, both multiple and independent, that occur over a broad span of time"); *Love v. National Medical Enterprises*, 230 F.3d 765, 773 (5th Cir. 2000) (the Separate Accrual Rule allows "recovery for injury caused by the commission of a

separable, new predicate act within the limitations period").

Quite simply, the Separate Accrual Rule underscores this Court's recognition that RICO is intended to combat predicate acts extending over a substantial period of time. *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989).

II. Petitioner's Lawsuit Involves an Actual Case or Controversy That Is Appropriate for Review by This Court.

Petitioner alleges numerous predicate acts that state a cause of action for which relief may be granted under the RICO statute. Respondent provides no relevant support for its proposition that this Court's review is "inappropriate" and "not outcome determinative." These issues were thoroughly briefed in the lower courts. *See e.g.* Appellant's Brief, *Misischia v. St. John's Mercy Health Care et al.*, Appeal No. 05-3403, pp. 48-57; Appellant's Reply Brief, *Misischia v. St. John's Mercy Health Care et al.*, Appeal No. 05-3403, pp. 29-32. Also, Rule 10 sets forth the character of the reasons this Court grants certiorari, including a conflict between the circuit courts on the same important issue and a circuit court that conflicts with relevant decisions of the Supreme Court. United States Supreme Court Rule 10(a) and (c). Respondent fails to present any case law to support its argument that the Eighth Circuit's ruling in this case, dismissing a civil RICO lawsuit, is inappropriate for review by this Court.

Respondent's reliance on *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70 (1955) and *United Public Workers of America v. Mitchell*, 330 U.S. 75 (1946) is

misplaced. The authorities cited by Respondent are wholly inapplicable to the case at hand.

First, in *Rice*, the petitioner sought review of the dismissal of her state court claim against a cemetery for refusing to bury the remains of her husband based upon his race. The Court, reversing itself, dismissed certiorari finding there was no federal question "of substance" at issue because the state had enacted a statute that directly addressed the due process violations raised by the petitioner. *Rice*, 349 U.S. at 74. Although the statute was enacted after petitioner filed her claim, the Court held that a decision in *Rice* would only be significant to the petitioner and not important to the public; therefore, it was not a proper issue for the Court. No such intervening statute has stemmed the current confusion over the accrual of RICO actions. The questions raised herein continue to impact victims of racketeering nationwide, and there are special and important reasons for granting the writ of certiorari.

Second, in the *United Public Workers of America* case, the Court declined certiorari with regard to a number of petitioners. 330 U.S. 75. The petitioners were federal employees challenging application of the Hatch Act with regard to their contemplated involvement with political campaigns. Since the petitioners had not engaged in any activity in violation of the Hatch Act and were merely seeking a decision by the Court that they could engage in certain political activities, the Court found that the petitioners were seeking advisory opinions. By contrast, in the instant case, Petitioner's claims under RICO for damages to his business and property have been dismissed. Under these circumstances, there should be no doubt that Petitioner has demonstrated that there is a case or controversy that may be reviewed by this Court.

Petitioner is seeking certiorari to resolve the split among the circuit courts with regard to the accrual of a RICO action. This is a federal question "of substance". In addition, the underlying harm in this matter is of great public importance and a determination in this case will be significant to healthcare entities, physicians and the healthcare consuming public. Furthermore, this case will be of great importance to all litigants who seek to prosecute or defend claims under the RICO law.

Petitioner is not seeking an advisory opinion. Petitioner alleges that the Respondents' actions are a violation of RICO. A decision by this Court in this matter will resolve the widespread confusion among the lower courts regarding when a RICO action accrues and which claims may be precluded by *res judicata* and/or the RICO statute of limitations.

III. Petitioner's RICO Claims Are Not Barred by *Res Judicata.*

Respondent contends that Petitioner does not contest the *res judicata* ruling issued by the Eighth Circuit in this case. That is a misstatement of Petitioner's position. Petitioner submits that but for the continued confusion over the accrual of a RICO cause of action, his RICO claims would not have been barred by *res judicata.* In short, *res judicata* should not apply to the numerous predicate acts that Petitioner alleges were committed after the filing of his state court lawsuit in October 1994. *See Baker Group v. Burlington Northern and Santa Fe Railway Co.*, 228 F.3d 883, 886 (8th Cir. 2000).

Moreover, the decision below erred in citing *Dubuc v. Green Oak Township*, 312 F.3d 736 (6th Cir. 2002) in

support of its *res judicata* analysis. In this case, Petitioner alleges an ongoing scheme of racketeering, involving multiple predicate acts perpetrated by Respondents between 1994 and the filing of his federal RICO action in 2004. A party cannot relitigate the same issue "by merely positing a few additional facts." *Id.* at 751. However, the *Dubuc* court cautioned:

> This analysis of course, should not be read to preclude the victim of ongoing retaliation from filing multiple suits. If retaliation persists after the victim prevails in an initial suit, or even if the victim does not prevail, then *res judicata* would not affect access to the courts.

Id. at 750.

IV. A Uniform Rule as to When a RICO Claim Accrues Is Needed.

The lower courts have held that this case centers on *res judicata*, when it does not. The issue in this case is whether the Separate Accrual Rule should apply to Petitioner's claims of the ongoing predicate acts being committed by Respondents. This Rule allows a person to bring a RICO claim for ongoing predicate acts that cause him injury within the four-year limitations period, while citing prior predicate acts in order to establish the pattern of racketeering. This Rule transcends *res judicata* and the RICO statute of limitations. It has significance independent of those concepts, while relating to both.

Under the lower courts' improper analysis, if a plaintiff ever brought (or could have brought) RICO claims in an earlier lawsuit, he will be forever barred from seeking relief under the RICO statute in the future. Such a result

would grant indefinite immunity to corporate violators or other racketeers for future predicate acts. Such a result also conflicts with this Court's recognition that RICO is intended to combat predicate acts extending over a substantial period of time. *H.J., Inc.*, 492 U.S. at 242.

In the instant case, Petitioner alleges ongoing predicate acts, including but not limited to the mailing of extortionate letters in 2001 and 2002. While acknowledging these allegations, the Eighth Circuit ruled that the 2001 and 2002 predicate acts were "unrelated" to prior events described in the Complaint. App. 7a. If the acts are unrelated to prior acts of racketeering, but pled, then Petitioner should be permitted to prosecute those claims. If the predicate acts alleged to have occurred during 2001 and 2002 are related to the earlier predicate acts, then a bar against the older predicates does not preclude prosecution of a RICO claim based on those later predicate acts.[3]

Petitioner is not seeking to litigate a pattern of old predicate acts. Respondents brought their racketeering activities into the present, and they should not be permitted to hide their illegal conduct behind the shield of past litigation.

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[3] Respondent's assertion that Petitioner waived his opportunity to amend the RICO Complaint is not true. In his Opposition to the Motions to Dismiss filed by Respondent St. John's and by Respondents Farrell, Noble, and Weber, Petitioner specifically requested leave to amend his Complaint to correct any perceived defect in pleading his RICO claims. Due to the speed with which the District Court closed the file upon dismissal, Petitioner had no opportunity to file a motion to amend. In his appeal to the Eighth Circuit, Petitioner argued that the district court should have permitted any deficiencies in pleading his RICO counts to be corrected through the filing of an Amended Complaint.

CONCLUSION

An illicit enterprise should not be permitted to indefinitely continue its racketeering activities merely because a plaintiff did not complain about continuous and ongoing predicate acts at an earlier date. Therefore, a uniform rule for RICO cases, such as the Separate Accrual Rule, should be adopted by this Court to prevent any future confusion on this important issue.

The decision below sets a dangerous precedent. This Court's direction is needed so that the split in the circuits can be resolved and so that clarity may replace confusion over when ongoing acts of racketeering will be actionable. Without this Court's leadership on the issue of when a civil RICO claim accrues, Justice Scalia's prediction[4] that the circuits will not be unified will continue to be a reality. For all these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] *H.J., Inc.*, 492 U.S. at 255 (Scalia, J., concurring).